

No. 82-2102

In The
Supreme Court of the United States

October Term, 1983

CITY OF ROCHESTER,

Respondent,

VS.

ANGELO CHIARELLA, REAL ESTATE BOARD OF
ROCHESTER, NEW YORK, INC., and MIDTOWN
HOLDINGS CORP., each individually and on behalf of all
payers of real property taxes to the City of Rochester, for the
fiscal years 1974-75 through 1977-78,

Class Defendants,

QUALITY PACKAGING SUPPLY CORP., ARTHUR N.
BAILEY, MC CRORY CORPORATION and RICHARD
W. KATOS (Petitioners).

Appellants-Petitioners,

ANGELO CHIARELLA,

Appellant,

STEPHEN J. and CHARLENE SERCU,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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**To The Honorable Justices Of The United States Supreme
Court:**

**Respondent City of Rochester hereby files this brief in op-
position to the Petition for Certiorari filed by Quality Packag-
ing Supply Corp., Arthur N. Bailey, McCrory Corporation and
Richard W. Katos (Petitioners).**

I.

STATEMENT OF FACTS

For more than a century New York State's large cities have
been limited by the state constitution in the amount of property
taxes they can levy and collect annually for operating expenses.

These limits have remained unchanged and are more severe than those imposed on any other type of municipality in the state; indeed, some municipalities with populations larger than most cities have no limits at all, merely because they are not chartered as cities. (See New York Constitution, Article VIII, Section 10.) The reluctance of state legislators to vote for equitable state tax reform or significant alternative revenue sources has kept the property tax as the cities' single biggest resource for services and programs. State mandates regarding the way in which much of local money must be spent, as well as the pressing needs of their urban populations, have caused the cities constantly to levy property taxes to the full extent of their constitutional limits. The tax limits and lack of meaningful state action, combined with demographic and industrial shifts and declining tax bases, have prevented the cities from adequately financing themselves with the result that their infrastructures, services and programs have steadily deteriorated.

In 1969, the New York State legislature attempted to alleviate the problem of constitutional tax limits by assigning a useful life to one of the major state mandates, annual municipal retirement and social security contributions, in effect capitalizing that very large local expense and therefore excluding it from the severe constitutional property tax limit that applied to operating expenses. (See N.Y. Local Finance Law, Section 11(a)(42-a), L. 1969, c. 1105.) In March, 1974, the New York Court of Appeals decided that it was unreasonable to capitalize this annual recurring expense, and that therefore this expense had to be included within the property tax raised for operating expenses. (See *Hurd v. City of Buffalo*, 34 N.Y. 2d 628 (1974.)) By that time, however, the cities were pushing against their constitutional property tax limits even without including retirement and social security contributions in operating expenses. To re-include those costs within the limited property tax would have caused monumental adjustments downward in municipal

services and programs. Rochester, for example, would have had to cut its operating budget by more than \$16,000,000 or 15%.

Faced with this situation, the state legislature proposed a constitutional amendment to the real property tax limits of large cities, and adopted legislation that allowed those cities to continue to exclude retirement and social security contributions from operating expenses on a short-term "emergency" basis, pending voter consideration of the constitutional amendment. (See L. 1974, c. 496; L. 1975, c. 325.) Upon the authority of the state legislation, Rochester excluded retirement and social security contributions from its constitutional property tax limit in fiscal 1974-75 and fiscal 1975-76. The proposed constitutional amendment was defeated in November, 1975. Consequently, the state legislature in 1976 proposed a constitutional convention to deal with the problem of real property tax limits, and adopted legislation that allowed the cities to exclude retirement and social security contributions from operating expenses in gradually diminishing proportions over a four-year period, again on an "emergency" basis, pending voter consideration of the proposed convention and, presumably, the work of the convention itself. (See L. 1976, c. 349.) Upon the authority of that state legislation Rochester excluded much of its retirement and social security contributions from its constitutional property tax limit in fiscal 1976-77 and fiscal 1977-78. The proposed constitutional convention was defeated in November, 1977. By that time, Rochester had levied \$103,000,000 in real property taxes in reliance on the "emergency" state legislation.

In *Waldert v. City of Rochester*, 44 N.Y. 2d 831 (1978), and *Angelone v. City of Rochester*, 52 N.Y. 2d 982 (1981), the Court of Appeals struck down the provisions of the 1974, 1975 and 1976 state legislation on the basis of *Hurd*, and ordered the

cities to refund "real property taxes paid in excess of the constitutional limitation if such taxes were paid under appropriate protest" (44 N.Y. 2d at 835). The Court of Appeals also rejected the notion "that the fiscal crisis presently encountered by cities and school districts constitutes an emergency justifying suspension of constitutional limitations pursuant to the emergency clause in the State Constitution (NY Const, art III, §25)", holding that the emergency clause applied only to "enemy attack or other forms of disaster" (44 N.Y. 2d at 834).

Despite the Court of Appeal's 1974 decision in *Hurd*, during the four fiscal years from 1974 to 1978 the petitioners paid excess unconstitutional real property taxes to the City of Rochester routinely and without written protest specifying any objection to the taxes. The taxes were levied and became a lien on July 1 of each year. Although all taxes were due and payable by July 31, Rochester, by charter provision, permitted payment of taxes stretching over four equal installments until the following April, without any interest. Interest was applied only to delinquent installments, and equaled an annualized rate of approximately 7½%.

After the *Waldert* decision, Rochester made drastic budget cuts, and subsequently started this class action so as to gather all its taxpayers into one judicial forum, forestalling thousands of individual lawsuits for recovery of taxes with potentially different results. At Rochester's request, the New York Supreme Court Justice supervising the class action ordered the City to submit a refund plan, which Rochester did, proposing to make refunds in equal amounts to all taxpayers, protestors and non-protestors alike. Rochester proposed to make refunds to protestors on the basis of their legal rights, and to non-protestors on the basis of its authority to pay equitable claims under New York General City Law Section 20(5). Rochester's plan was based on anticipated state legislation that would provide state money (in the form of a no-interest, open-term

loan) to permit refunds to everyone in an amount equal to 50% of their excess payments, without having to raise their property taxes. City officials went to Albany and, after intense effort, got the necessary state legislation. (See L. 1981, c. 726, and L. 1982, c. 27.)

In the class action, the petitioners asserted a claim for recovery of taxes as a matter of legal right, despite their failure, at the time they paid their taxes, to file written protest specifying any objection to the taxes. In a full opinion, the New York Court of Appeals has affirmed the order of the Appellate Division rejecting this claim (*City of Rochester v. Chiarella*, 58 N.Y. 2d 316), and it is this affirmance that the petitioners seek to have reviewed in this Court by writ of certiorari. The class action is continuing toward consideration of Rochester's refund plan.

II.

The fact that a state tax violates a state constitution does not, by itself, raise a question of federal law, nor does it preclude, as a matter of law, the imposition of conditions to be followed for recovery of the tax.

The petitioners paid property taxes levied by Rochester pursuant to state legislation later declared to be an unreasonable exercise of the state legislature's state constitutional power (i) to establish periods of probable usefulness for items of local government expense, and (ii) to deal with state emergencies. When they paid their taxes, the petitioners failed to observe New York's common law requirement of written protest, which is a condition precedent to maintaining any action for the recovery of unlawful taxes, a condition imposed by state decisional law rather than any statute. The petitioners paid their taxes routinely, under no affirmative pressure or threat from Rochester prompting them to do so. Rochester's commonplace tax lien on real property and

reasonable interest on unpaid tax installments have been held by the New York Court of Appeals in the decision below not to constitute coercion or duress in the payment of taxes, and that holding is not sought to be reviewed in this Court.

The petitioners argue, first, that when a tax is unconstitutional, it is void, and therefore no condition precedent whatsoever can be imposed on maintaining an action for recovery of the tax; and, second, that because a person has a property right in a tax he has paid in ignorance of its unconstitutionality, imposition of the particular condition of protest is a deprivation of property without due process and a denial of equal protection of the laws.

The second argument will be discussed in Part III, below. As to the first argument, several points must be noted. First, the argument does not raise even a colorable question of federal law. Such a question is a requirement for review by this Court. (See 28 U.S.C. §1257(3) and Rule 17 of the Rules of the United States Supreme Court.) Whether a state tax that is in violation of a state constitution may be recovered without any conditions or prerequisites whatsoever is solely a matter of state law. Furthermore, the petitioners have cited no conflict between state courts, or between federal courts, or between any courts and this Court, that would indicate that the questions they seek to have reviewed here are special and important questions of federal law.

Second, the argument is overly broad, and therefore incorrect as a principle of law. Granted that an unconstitutional tax is void, recovery of the tax is not automatic, as the petitioners' argument implies. The state may properly condition recovery of the tax on a number of prerequisites (for example, (i) the commencement of an action, (ii) in the proper court, (iii) within the statute of limitations). Thus, it cannot be said, as a matter of law, that merely because an unconstitutional tax is void, no conditions precedent whatsoever may be

imposed on maintaining an action for recovery of the tax. (Whether the particular condition of written protest is reasonable is a separate question to be discussed below.)

Third, reliance on *Marbury v. Madison*, 1 Cr. 137, 2 L. Ed. 60 (1803), is misplaced. Among other things, that case stands for the proposition that the federal judiciary has the power to review actions of the federal legislature for compatibility with the federal constitution. Whether such a proposition applies in a state context is not mandated by *Marbury*, but left to the constitution and judiciary of each state to decide.

III.

Written protest as a condition to recovery of unconstitutional taxes reasonably balances competing public and private interests regarding payment of disputed taxes, and therefore does not deprive persons of property without due process.

The petitioners' second argument is that because a person has a property right in a tax he has paid in ignorance of its unconstitutionality, imposition of the condition of protest is a deprivation of property without due process and a denial of equal protection of the laws.

With respect to the equal protection part of the argument, it should be noted that New York's common law requirement of protest does not establish any categories or classifications. The requirement is that all persons protest payment of their taxes if they wish to preserve their right to contest and recover those taxes at a later date. By failing to protest, some persons put themselves in a different position from those who do protest. Thus, the requirement of protest simply does not deny equal protection of the laws to anyone; indeed, it affords it to all those who wish to take advantage of it.

If there is any merit to the petitioners' argument, it is that the requirement of protest is a deprivation of property without due process. The requirement of protest developed slowly in New York. Originally, if a person knew that a tax was unlawful, he had two choices. He could start an action to contest the tax and get a judicial resolution of the controversy before he paid it; or he could refuse to pay the tax, wait until the municipality tried to enforce collection of it, and then defend the merits of his position. See *Peyser v. The Mayor*, 70 N.Y. 497 (1877); *Pursell v. The Mayor*, 85 N.Y. 330 (1881); *Strusburgh v. The Mayor*, 87 N.Y. 452 (1882). Both choices are still available today. However, a person could not pay his taxes under written protest, because any payment before a judicial resolution of the validity of the tax was considered "purely voluntary" (*People v. Wilmerding*, 136 N.Y. 363 at 374 (1893)).

The principle behind this notion was that only a taxpayer lawsuit expressed the kind of authentic and timely resistance to its taxes that gave a municipality adequately specific notice of the taxpayer's legal position and of the financial dimensions of the potential problem. This notice was considered critical so that a municipality could safely spend the taxes it had collected without fear of having to make refunds many years later. Over the years, the New York courts carved out a few well-warranted exceptions to the rule of authentic and timely resistance. Yet, the main burden remained on the taxpayer to hire a lawyer and conduct a lawsuit before paying his taxes, while during the litigation the taxes remained a lien on his property and interest accumulated on the taxes which he would also have to pay if he lost his lawsuit. Finally, however, in 1943, the New York courts permitted payment of taxes under specific written protest to substitute for the commencement of a lawsuit as an adequate type of notice of authentic and timely resistance to a tax. See *Title Guarantee and Trust Co. v. City of New York*, 265 A.D. 304, *aff'd* 290 N.Y. 910 (1943).

As is evident from this very brief analysis of the New York cases, protest developed as a taxpayer substitute for the more burdensome methods of indicating adequate and timely resistance to a tax. Protest permits the taxpayer to avoid the evils of non-payment of his tax: a lien, the accrual of interest, the threat of enforcement proceedings. It permits him to avoid the expense of having immediately to retain a lawyer and start an action to resist the tax. It permits him to avoid the risk of making a payment that might be labeled voluntary, while preserving his remedy for another day so he can investigate and research his position, gather his resources, or perhaps await the result of someone else's test case. If taxpayers must warn a municipality of possible future resistance to its taxes, then they ought to be allowed to do so in a relatively easy and direct manner that enables them to preserve their options while avoiding certain evils, expenses and risks. Payment under written protest is the simple mechanism that achieves these goals.

A municipality obviously needs a timely and reasonably specific warning that its taxes may be resisted by an individual in a future legal action, and that it may be required to refund those taxes. Such a warning alerts the municipality not to be lulled by the individual payment of the tax, but instead to evaluate the reason for the resistance and either correct its error or prepare its defense, and make any financial arrangements deemed advisable in view of the contingent liability. As to the latter point, the warning of timely resistance enables a municipality to gauge the scope of its potential liability with reasonable accuracy, since any liability will be limited to those individuals who have properly indicated their resistance. Timely resistance enables the municipality to function without the threat of severe disruption from an unexpected source, namely the claims of those who pay their taxes without objection. Also, it assures the important element of finality in municipal finance, since the municipality can spend safely the taxes paid without objection or resistance.

The requirement of written protest is neither obsolete nor meaningless, but is a historical development that continues to have legitimate and important value in the way it balances competing public and private interests regarding payment of disputed taxes. It is a simple mechanism that the petitioners could have used if they had had any thought that their taxes were illegal. The requirement of protest does not deprive a taxpayer of property without due process.

Furthermore, in this case the petitioners knew or should have known of the probable unconstitutionality of the taxes because they paid them after the virtually identical taxes had been declared unconstitutional by the Court of Appeals in *Hurd v. City of Buffalo*, 34 N.Y. 2d 628 (1974). As the Court of Appeals wrote in the decision sought to be reviewed:

“When a payment is made under a mistake of law, with actual or constructive knowledge of the facts, *as in the present case*, it is incumbent upon the taxpayer to demonstrate that payment was made involuntarily (citation omitted). Payment of a tax under appropriate protest will ordinarily suffice to indicate the involuntary nature of the payment (citation omitted)” (Emphasis added)

(58 N.Y. 2d at 323).

Thus, this is not a case where no degree of reasonable taxpayer vigilance could have alerted the petitioners to the doubtful validity of the tax. The petitioners' payment in ignorance was induced by their own lack of the most rudimentary attention to notorious public affairs that should be expected of every citizen. This is attested by the fact that many other Rochester taxpayers did properly protest their taxes for the years in question. Consequently, the petitioners are not in a very good position to claim denial of due process.

IV.

CONCLUSION

For the reasons stated, the petitioners' petition for a writ of certiorari should not be granted, as review by this Court is not warranted.

Respectfully submitted,

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